STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 19, 2006
v	No. 265142 Oakland Circuit Court
TERRY ALAN LEGGETT, Defendant-Appellant.	LC No. 2005-202811-FH

Before: Murphy, P.J., and Smolenski and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of entering without breaking, MCL 750.111. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to a prison term of 30 months to 20 years. He appeals as of right. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's conviction arises from the theft of some electric hedge trimmers from the complainant's detached garage. A police officer spotted defendant in the vicinity of the crime shortly after the offense. Defendant was riding a bicycle and wearing a backpack. The complainant's hedge trimmers were in the backpack. Defendant volunteered that he took the hedge trimmers from the garage.

Defendant testified that he was riding his bike in the neighborhood and was going to go under a tree and wait for the rain to slow down. He initially testified that he entered the complainant's garage to get some shelter from the rain, but then explained that he did not know how he ended up in the garage. He testified that he "passed out" while in the garage. He "came to" when he heard the garage door closing, and left the garage on foot. Defendant stated that he rode[1] half a block from the home when he first noticed the hedge trimmers in his back pack. He explained, "I was kind of – I come out of my – of my – I'm passed out, man, I'm kind of discombobulated a little bit, you know." Asked why he told the police that he took the hedge trimmers, defendant stated, "I don't know, I was still kind of fuzzy minded. I was a little fuzzy. My head was a little fuzzy, man." When asked to admit that he took the hedge trimmers out of

[1] Defendant did not explain at what point he resumed riding his bicycle.

the garage, defendant responded, "Not to my knowledge. Not under my right sound being, man. I didn't."

Defendant testified that he had passed out on other occasions, which he believed was linked to a closed head injury he suffered in 1992. He also stated that he was under the influence of drugs or alcohol and had been "up a couple of days."

Defendant first argues that the trial court erroneously allowed the prosecutor to impeach him with evidence of a 1995 conviction for armed robbery.

This Court reviews a trial court's decision regarding whether a prior conviction may be used to impeach a witness for an abuse of discretion. *People v Meshell*, 265 Mich App 616, 634; 696 NW2d 754 (2005). If the decision involves a preliminary question of law, that question is reviewed de novo. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

Pursuant to MRE 609(a)(2), theft crimes may be admitted for impeachment of a defendant in a criminal trial if the court "determines that the evidence has significant probative value on the issue of credibility" and the "probative value of the evidence outweighs its prejudicial effect." MRE 609(b) states:

> For purposes of the probative value determination required by subrule (a)(2)(B), the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is required, the court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify. *The court must articulate, on the record, the analysis of each factor*. [Emphasis added.]

Defendant is correct that the trial court did not articulate its analysis of each factor. However, the court's failure to articulate its analysis may be harmless. See *People v Daniels*, 192 Mich App 658, 671; 482 NW2d 176 (1992).

In any event, an evidentiary error does not require reversal unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Here, defendant's testimony lacked credibility because of the implausibility of his account, not because he was impeached by the armed robbery conviction, which was only briefly mentioned at trial. Under the circumstances, it is not more probable than not that the alleged error affected the verdict. Because any error was harmless, we need not determine whether the evidence was properly admitted in the first instance. *People v Whittaker*, 465 Mich 422, 427-429; 635 NW2d 687 (2001).

Defendant also argues that trial counsel was ineffective for failing to request an instruction on the lesser misdemeanor offense of entering without permission, MCL 750.115(1).

Because defendant did not move for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), this Court's review is limited to errors apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, a defendant must show "that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." *Id*. at 578 (citations and internal quotation marks omitted). He must show that his counsel's representation "fell below an objective standard of reasonableness . . . ." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). He "must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *Id*. He must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different . . . ." *Id*. at 302-303 (citations and internal quotation marks omitted).

Breaking and entering or entering without permission, MCL 750.115, is a necessarily included lesser offense of entering without breaking with intent to commit a larceny, MCL 750.111. Cf. *People v Cornell*, 466 Mich 335, 360-361; 646 NW2d 127 (2002) (concluding that breaking and entering or entering without permission, MCL 750.115, is a necessarily included lesser offense of breaking and entering with intent to commit larceny, MCL 750.110.)

"[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *Id*. at 357. In this case, as in *Cornell, supra,* the intent to commit a larceny was a disputed factual element that was part of the greater, but not the lesser, offense. Because defendant denied having the intent to commit larceny when he entered the garage, an instruction on the lesser misdemeanor offense would have been proper had defense counsel requested it.

Defense counsel's decision not to request the instruction may have been a matter of trial strategy, intended to force the jury to make an all-or-nothing decision. See *People v Nickson*, 120 Mich App 681, 687; 327 NW2d 333 (1982). However, defense counsel's comments before trial suggest that he did not make a strategic decision, but was unaware of or misunderstood the applicability of MCL 750.115.

But even if counsel's failure to request an instruction on the misdemeanor was a mistake rather than a strategic decision, defendant was not prejudiced by counsel's inaction. To obtain relief on the basis of ineffective assistance of counsel, defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different . . . ." *Toma, supra* at 302-303 (citations and internal quotation marks omitted). Defendant did not deny entering the complainant's garage or leaving with the complainant's property. Defendant's entry and removal of the property allowed the jury to infer that he entered the garage with the intent to steal. See *People v Willis*, 26 Mich App 366, 367; 182 NW2d 608 (1970). Although defendant denied intending to take the property, he testified that he had no idea how he came to be in the garage or how the hedge trimmers appeared in his backpack. Considering defendant's inability to explain either of these events, there is no reasonable

probability that the result of the trial would have been different had the jury been instructed on the lesser misdemeanor offense.

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Kirsten Frank Kelly